SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

No. 324

WESTSIDE LIQUOR COMPANY, a California Corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, and Numbered Therein No. 30427.

JURISDICTIONAL STATEMENT.

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Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, and Numbered Therein No. 30427.

JURISDICTIONAL STATEMENT.

Prior Proceedings.

This is an appeal by a retail liquor licensee from the decision of the California Court of Appeal entered February 27, 1968 (reported in 66 Cal. Rptr. 435, 259 A.C.A. 532), in which a rehearing was denied on March 26, 1968 and a hearing in the Supreme Court of the State of California was denied on April 24, 1968, at which time the decision of the Court of Appeal became final. The decision of the Court of Appeal (which is

appended hereto as Appendix A) reversed an order of Harold F. Collins, Judge of the Superior Court of the State of California for the County of Los Angeles, denying the application of the Department of Alcoholic Beverage Control of the State of California for a writ of mandate directed to the Alcoholic Beverage Control Appeals Board of the State of California, which held in favor of the Appellant in an unreported decision, a copy of which is appended hereto as Appendix B.

Grounds on Which Jurisdiction of Supreme Court Is Invoked.

Appellant had its license revoked by the Deparment of Alcoholic Beverage Control of the State of California for sales of liquor below the mandatory retail prices which had been filed by liquor distributors with the State of California.

The decision of the Department was reversed on state grounds by the Alcoholic Beverage Control Appeals Board of the State of California. The Department applied for a writ of mandate to the Superior Court to reverse the Appeals Board. The writ was denied by the Superior Court of the State of California for the County of Los Angeles, and on appeal, the California Court of Appeal reversed the Superior Court and the Appeals Board so that the revocation of appellant's license was to go into effect. The judgment of the Court of Appeal of the State of California from which review is sought was entered on February 27, 1968. A rehearing was denied on March 26, 1968 and a hearing was denied by the Supreme Court of the State of California on April 24, 1968, at which time the decision of the Court of Appeal became final.

A Notice of Appeal to this Court was filed on July 2, 1968 in the Court of Appeal of the State of California.

The action by the Appeals Board in reversing the decision of the Department and the action of the Superior Court of the State of California in denying the Department's application for a writ of mandate left the license of appellant unaffected. It was not until the Court of Appeal reversed the Superior Court and the Appeals Board that the qeustion of the validity of the California statutes under federal grounds became relevant. In its petition for rehearing before the Court of Appeal and in its petition for hearing before the Supreme Court of the State of California, appellant raised the federal questions sought to be reviewed. The Court of Appeal denied a rehearing without opinion and the Supreme Court of the State of California denied a hearing without opinion. Appellant's petition for rehearing the Court of Appeal and petition for hearing in the Supreme Court of the State of California are included in the record on appeal.

This is an appeal pursuant to 28 U.S.C.A. § 1257(2). Among the cases sustaining jurisdiction are *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1264; and *Standard Oil Company of California v. Johnson,* 316 U.S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

The California laws which appellant claims to be in violation of the United States Constitution and the federal anti-trust laws are California Business and Professions Code, § 24755, a copy of which is appended hereto as Appendix C, and Title 4, California Administrative Code, Rule 99, a copy of which is appended hereto as Appendix D.

Questions Presented by This Appeal.

The questions presented by this appeal are as follows:

1. Whether the California Liquor Price Fixing Laws (§24755 of the California Business and Professions Code) are invalid as being in violation of the anti-trust laws of the United States (15 U.S.C.A. §§ 1, 2 and 45), because they do not come within the exceptions provided in the Miller-Tydings or McGuire Acts and because prices are fixed for goods that are not in fair and open competition.

2. Whether § 24755 of the California Business and Professions Code and Title 4, Rule 99, of the California Administrative Code are violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because:

(a) The statute sets up privileges for liquor manufacturers and wholesalers whereby the State of California at public expenses enforces the fixed price. Such enforcement is not provided for any other industry.

(b) Two different trading areas are set up within the state. No valid reason or legitimate purpose exists for either of the foregoing discriminatory practices.

(c) A state function is delegated to private industry without adequate, or, indeed any, safeguards.

(d) Economically disadvantaged persons are required to purchase inferior goods and are prevented from taking advantage of quantity discounts. The statute, if effective, only enforces prohibition for the poor and not the wealthy.

Facts Material to the Consideration of the Questions Presented.

Appellant holds a license to sell alcoholic beverages. This license was revoked after an administrative hearing by the Department of Alcoholic Beverage Control for a sale of alcoholic beverages below a minimum price filed by the manufacturer or brand owner of the alcoholic beverages in violation of § 24755 of the California Business and Professions Code.

Present counsel for appellant was substituted into the case after the cause had been submitted for hearing by the Court of Appeal but prior to the time it was decided by that court. Concurrently with the filing of the substitution of attorneys, appellant, through its new counsel, filed an application with the Court of Appeal to vacate the submission and for leave to file a brief on behalf of appellant as the real party in interest in said action presenting, among other things, the federal questions presented on this appeal. The application was denied by the Court of Appeal. Following the decision of the Court of Appeal appellant filed a petition for rehearing in which the federal questions were presented to the court. The petition for rehearing was denied without opinion. Thereafter appellant filed a petition for hearing by the Supreme Court of the State of California in which the federal questions were presented to the court. The petition for hearing by the Supreme Court of the State of California was denied without opinion.

The attitude of the California courts has been that the constitutional issues have been settled in California by virtue of the cases of *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal. 2d

349, 55 Cal. Rptr. 23 (1966), and *Reimel v. Alcoholic Beverage Control Appeals Board,* 256 A.C.A. 188, 64 Cal. Rptr. 26 (1968) (now before this Court as *Cohon v. Reimel,* October Term, 1967).

In addition to *Cohon v. Reimel* (October Term, 1967), there is pending before this Court *Samson Market Company, Inc. v. Kirby,* October Term, 1967. Both *Cohon v. Reimel* and *Samson v. Kirby* present substantially the same questions as are presented by this appeal. There are similar cases currently pending in the Appellate Courts of the State of California which present substantially the same questions as are presented by this appeal and which may ultimately be appealed to this Court.

Under § 24755 of the Business and Professions Code and Rule 99 of the Administrative Code of the State of California, the manufacturer of alcoholic beverages need only file a minimum price schedule for such beverages with the Department of Alcoholic Beverage Control and publish the price list in a trade journal. Thereafter, the State of California, at no expense whatseover to the manufacturer, enforces his minimum price by gathering evidence and prosecuting violators. There is no state control of the price to be set. Only the manufacturer sets the price.

The manufacturer may consult with the wholesaler or authorize the wholesaler to file the price on the manufacturer's behalf.

Further evidence that this law is purely for the benefit of liquor distillers and wholesalers and not for the public was sought to be brought out in various cases challenging the statute and rule before the Cali-

fornia courts. In the supplemental brief in the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra,* there was an attempt to introduce into evidence the speech of Malcolm E. Harris, at the time Director of the California Department of Alcoholic Beverage Control.

In this speech, which was refused in evidence, Mr. Harris noted numerous practices existing in the liquor industry which pointed to lack of free and open competition. In his speech before the liquor wholesalers and distillers Mr. Harris said:

> "At various times in the past nearly everyone in this room, either individually or through your trade associations, has complained to me that Fair Trade violations damage your business. The sections I have quoted give you the opportunity to collect for the damages you have alleged. Even though you may prove only one cent of damages, at least you will put the offending retailers on notice that you mean business with your Fair Trade contracts. Of course, if no suits for damages are filed after the Department has furnished evidence of violations, two logical conclusions could be drawn: First, *no one has been damaged* (emphasis added), and second, if no one has been damaged by Fair Trade violations, the state should not use its police power to enforce fair trade."

This is a clear statement by the Director that the purpose of Fair Trade in California is to benefit the distillers and not the public. He states that if the distillers and wholesalers are not damaged enough to want to institute actions themselves, then no one is damaged and the State of California should not enforce the provisions.

A Substantial Federal Question Is Involved in the Proposed Appeal.

Appellant alleges that Section 24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and further that it is in conflict with Sections 1 and 2 of the Sherman Anti-trust Act (15 U.S.C.A. 1 and 2). This State statute has been before the California Supreme Court twice in the last eight years, *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 346 P. 2d 737 (1959), and *Wilke & Holzheiser v. Department of Alcoholic Beverage Control, supra.*

The statute, as stated, is California's mandatory price fixing statute which provides for manufacturers to publish the price at which their brands are to be sold and the retail licensees are subjected to fines or suspension and/or revocation of license for sale below the filed price. In the *Allied Properties* case, *supra,* Superior Court Judge Albert Wollenberg (currently a United States District Court Judge for the Northern District of California, Southern Division) found the statute unconstitutional. On appeal, by a two to one decision of the California Court of Appeal, he was reversed and the statute was found constitutional. In 1959, by a four to three decision of the California Supreme Court, the Court of Appeal was affirmed and the statute was found constitutional. Neither an appeal nor a petition for certiorari were taken to the United States Supreme Court in that case.

In the case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control, supra,* the California Supreme Court, by a five to two decision in 1966, again declared the statute constitutional. After the California Supreme Courts' decision was final, application was made to a three judge District Court which decided *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F. Supp. 168 and held, at page 170 that:

> "A judgment upon the merits in a state court action is res judicata in a subsequent federal court action where the parties and the subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end . . . Plaintiff's remedy after the final judgment of the state courts was that of appeal or petition for certiorari to the United States Supreme Court."

Neither *Wilkie & Holzheiser* nor *Allied Properties* were appealed to the United States Supreme Court. This case and the other California cases currently pending before the United States Supreme Court are the first to tender to this Court the question of the Constitutionality of the California liquor price fixing statute.

In addition to the split which exists among the California judges themselves as to the constitutionality of the statute (in the original case involving liquor price fixing, *Allied Properties,* six judges held the statute constitutional and five held it unconstitutional), there

is a sharp division of authority among the highest courts of other states as to the constitutionality of similar price fixing statutes.

Most of the other state courts which have been confronted with similar liquor price fixing statutes have held them unconstitutional.

In *Reynolds v. Louisiana Board of Alcoholic Beverage Control,* La. 1966, 185 So. 2d 794, the Louisiana Supreme Court held its mandatory price fixing statute (similar to that of California) unconstitutional as violative of the Due Process Clause of the Federal Constitution. The court states at page 812 that the statute

> "bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignorable flight from competition."

A petition for certiorari was filed in the United States Supreme Court and was denied on November 14, 1966, U.S. Law Week 3173.

In addition, the California decision is in conflict with the decision of the Supreme Court of New Mexco in *Drink, Inc. v. Babcock,* 421 P. 2d 798, in which the court stated at page 803:

> "We hold that the fair trade contract and mark-up processes of the liquor control act are manifestly unreasonable legislation and are not an appropriate exercise of the States' police power . . ."

Such an act has also been held unconstitutional by the Florida Supreme Court in *Scarborough v. Webb's*

Cutrate Drug Company, (1942) 150 Fla. 754, 8 So. 2d 913, where the court states at page 922:

> "The act, upon its face, is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his consumers may be forced to sell liquor at a substantial profit . . ."

The court further stated at page 921:

> "There is not one thing in the act to indicate that there were any legislative findings that any necessity existed for the terms of the act nor is there any power or authority vested in any board to make any findings of fact in regard thereto. No hearing is provided for, no Due Process is contemplated, all of which are certainly necessary to make a price fixing act valid."

Similar price fixing statutes were held unconstitutional by Oklahoma in *Oliver v. Oklahoma Alcoholic Beverage Control Board*, 359 P. 2d 183 (1961); in Kansas in *State v. Mermes*, 358 P. 2d 936 (1961); in Illinois in *Lombardo Wine Co. v. Taylor*, 95 N.E. 2d 60 and in Nebraska in *Terry Carpenter v. Nebraska Liquor Control Commission*, 120 N.W. 2d 374.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it sets up a rule for liquor retailers that does not exist for any other retailers and because, with no basis for the distinction, two different trading areas are set up within the State

and the manufacturer can file one price for Northern California and another price for Southern California.

In *Wilke & Holzheiser, supra*, and *Allied Properties, supra*, as well as in the instant cases, the California Attorney General representing the Department of Alcoholic Beverage Control, has argued that the Twenty-First Amendment to the United States Constitution prevents any challenge of the California statute based on the United States Constitution.

In the Memorandum in Opposition to the Application for Stay Pending Appeal in the Supreme Court herein, the Attorney General for the State of California cites *State Board of Equalization v. Young's Market*, 299 U.S. 59, 63-64, (1936) stating:

> "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In the same Memorandum, the Attorney General for the State of California makes a great point of *Schwartz v. Kelly*, 140 Conn. 176, 99 A. 2d 89 (1953), in which a hearing was denied by the United States Supreme Court. This case was prior to the recent line of cases in which the Court has asserted the interdependence of the Twenty-First Amendment on the other provisions of the Constitution. Also, the Connecticut statute is somewhat different from California's in that in Conn. Gen. Stats., Vol. 6, paragraphs 30-64 and 30-65, price schedules remain in effect only for the period fixed by the Commission, are uniform throughout the State and the Commission has power to vary the minimum consumer price as the Commission deems necessary. Also, the Connecticut statute is now considerably different

from California's in that § 30-68A has been added so that there are minimum markups on the price of liquor, making the pricing not wholly within the discretion of the distillers as it is in California.

The position that the Twenty-First Amendment gives the liquor industry some "privileged status" has recently been substantially altered by the United States Supreme Court. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 12 L. Ed. 2d at 380, 84 S. Ct. 1293, the Court states at 12 L. Ed. 2d at page 356, that

> "To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd oversimplification."

Also the Supreme Court in 1966 held, in *Joseph E. Seagram v. Hostetter,* 86 S. Ct. 1254, that the Twenty-First Amendment must be read in light of the other Amendments of the Constitution and although the court upheld the New York law being questioned there, it clearly established the principle that the state law had to be a reasonable law and not deny the requirements of equal protection of the laws as provided by the Fourteenth Amendment. The Court, at 86 S. Ct. 1261, in analyzing whether or not the New York law violated the Anti-trust Act, stated:

> "Nothing in the Twenty-First Amendment of course would prevent enforcement of the Sherman Act against such a conspiracy."

See also: *Idlewild Bon Voyage Liquor Corp. v. Epstein,* (1962) 370 U.S. 713, 8 L. Ed. 2d 794, wherein

the court held that there was a substantial constitutional question raised. Here an action of the New York State Liquor Authority was being challenged.

As recently as this term, in *Burke v. Ford,* 19 L. Ed. 2d 554 (1967), the Supreme Court held Per Curiam that the District Court had jurisdiction to hear a case based on § 1 of the Sherman Act against all Oklahoma liquor wholesalers who allegedly were engaged in a statewide market division. Here, liquor was involved completely within the state's borders and Federal law was still held to apply.

Section 24755 of the California Business and Professions Code, which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face violates Federal anti-trust laws. Whenever a judicial obstacle is created, the statute is changed. When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement. The elimination of this requirement, as well as the discretion of liquor distillers, is clearly not in accord with the anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal *per se* under the Federal anti-trust laws unless the Federal exemption statutes apply. (See *United States v. McKesson & Robbins,* 341 U.S. 305, 309-311 (1953) and *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386-388 (1950).

Since the California statute does not provide for either free and open competition or contracts, it is not immunized from Federal anti-trust laws. *Eastman Kodak v. Federal Trade Commission,* 2d Cir., 330 U.S. 828, clearly held that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

California has not permitted the licensee before the California Administrative Agencies or Courts to present evidence of lack of free and open competition. See: *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787 and *Dave's Market v. Department of Alcoholic Beverage Control,* 222 Cal. App. 2d 671.

Analogizing the mandatory price-fixing characteristics of the statute herein to those of the normal fair trade statutes, is clearly misleading. As Justice Peters of the California Supreme Court states in his dissent in *Wilke & Holzheiser v. Alcoholic Beverage Control,* 65 Cal. 2d 349 at p. 381:

> "Thus, the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprise a mandatory price-fixing system whereby the producers or wholesalers of branded or trademarked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the state of civil and criminal sanctions upon non-complying retailers."

Then Justice Peters goes on to say, at pages 381 and 382:

> "The liquor fair trade law is to be distinguished from the general Fair Trade Act applicable to all branded or trademarked commodities sold at retail which are in free and open competition with others of the same general class. . . . The general act is permissive rather than mandatory. . . . It is enforced only by private suits, not by criminal penalties or revocation or suspension of licenses by an administrative body."

If this Court will hear this appeal, appellants can bring before this Court facts concerning the structure of the liquor industry which show that there is no real competition between the big four distillers who control 90% of the liquor business in the United States. As former State Assemblyman Caspar Weinberger, currently Finance Director of the State of California, stated in an article in the San Mateo Times on April 28, 1964:

> "No one has satisfactorily explained why the State should allow liquor distillers and others in the business to fix and maintain prices as high as they wish when any other business that attempted to do that would be indicted and convicted under the Anti-trust laws."

The perniciousness of liquor price fixing laws is well analyzed by the "Moreland Commission on the Alcoholic Beverage Control Law," appointed by Governor Rockefeller. It was the Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to

pass the present New York statute held constitutional in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L. Ed. 336, 86 S. Ct. 1254. The Moreland Commission found at page 1 of the report that:

> "The mandatory price controls should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

As the Commission pointed out, the only effect of mandatory price fixing could be to make drinking economically impossible for low income groups to the benefit of the wealthy and the disadvantage of the poor. This would appear to be a distinction in violation of the Equal Protection Clause of the Fourteenth Amendment since, in effect, it would enact prohibition for the poor but not for the rich.

Further, it has been pointed out to the licensees that the Supreme Court of the United States is the only court available now to rule on the constitutionality of the California statute. In *Dave's Market v. Department of Alcoholic Beverage Control,* (U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103) a three Judge District Court was convened but sent the matter back for determination on state issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the state issues and therefore, appeal to the Supreme Court of the United States was the only remedy. This was also essentially the decision in the District Court case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F. Supp. 168.

Conclusion.

In conclusion, the effect of allowing a system within the most populous state whereby an industry dominated by four giants has powers denied to any other business, is far reaching. The effects on interstate commerce, as pointed out in *Burke v. Ford, supra,* are clear. The liquor comes into California from outside the state and the consultations that go on between wholesalers who represent various distillers and the distillers they represent, in order to set the most profitable price, provide avenues for legalized conspiracy that can affect prices in all states. The Twenty-First Amendment allows a state to forbid the sale of liquor within its borders, but like the familiar analogy of the corporate entity, once liquor is sold within a state the laws under which it is sold must be reasonable and non-discriminatory, and they must have some rational foundation and not merely be designed to serve one powerful interest group. The Twenty-First Amendment was certainly not designed to put the liquor industry into a more favored position than it had been prior to the passage of the Eighteenth Amendment as would be the situation if the Supreme Court of the United States allows § 24755 of the Business and Professions Code of California to remain in effect.

Dated at Los Angeles, California July 3, 1968.

HAROLD EASTON,
Attorney for Appellant.

(APPENDICES FOLLOW)

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Leverette D. House, Leon M. Cooper, Roger P. Garety, as Chairman and Members of the Alcoholic Beverage Control Appeals Board, Defendants and Respondents, and Westside Liquor Company, Inc., doing business as Hazan's Wine & Spirits, Real Party in Interest and Respondents. 2d Civ. No. 30427.

Filed Feb. 27, 1968.

APPEAL from a judgment of the Superior Court of Los Angeles County. Harold F. Collins, Judge. Reversed with directions.

Thomas C. Lynch, Attorney General and Lynn Henry Johnson, Deputy Attorney General, counsel for Appellant.

Charles P. Just, Chief Counsel and Leo K. Gallant, Senior Counsel, counsel for Respondents.

Harold Easton and Alan F. Kane, counsel for Real Party in Interest.

This is an appeal by the Department of Alcoholic Beverage Control of the State of California (hereinafter sometimes referred to as the Department) through its director, James O. Reimel, from a judgment of the trial court denying a petition for a writ of mandate (and discharging an alternative writ of mandate), which would have required the Alcoholic Beverage Control

Appeals Board (hereinafter sometimes referred to as the Board), to affirm the decision made by the Department.

Westside Liquor Company (hereinafter sometimes referred to as Westside), doing business as Hazan's Wines and Spirits, holds an off-sale general liquor license issued by the Department. On December 13, 1963, the Department filed an accusation against Westside in which it was alleged in separate counts that on each of three occasions (November 15, 18, and 22, 1963, respectively) Westside violated the Fair Trade Laws (Bus. & Prof. Code, § 24755) by making retail sales of alcoholic beverages at prices below the effective minimum retail prices. A hearing on these charges was conducted before a hearing officer from the Office of Administrative Procedure, who issued a proposed decision finding the accusations true. He recommended license revocation upon conditions permitting Westside to transfer the license to a third party, subject to 60 days suspension. The Department adopted the findings of the hearing officer, but modified the penalty and issued its decision revoking Westside's license on each count severally and separately.

Westside appealed to the Board, which rejected the grounds proposed by Westside for reversal of the Department's decision, but on its own motion undertook to consider the issue, not theretofore raised of whether the minimum retail prices which the Department sought to enforce had been published in accordance with the publication provisions of Business and Professions Code section 24755(b). On this issue, the Board determined the case adversely to the Department, holding that the record did not contain substantial evidence

of the publication of these specific minimum prices in compliance with the controlling statute. The Board founded its decision on a determination that the Department's rule 99(k) (Tit. IV, Cal. Adm. Code), conflicted with the provisions of the statute insofar as it permitted publication of minimum prices in a trade journal in general circulation among liquor licensees in the trading area affected to satisfy the publication requirement, and was therefore invalid.

Following the Board's decision, the Department filed the instant petition for writ of mandate in the superior court; the Board answered and Westside intervened. The court affirmed the Board's action, and the Department appeals the court's denial of the requested writ.

A résumé of some of the facts, as disclosed by the record, shows that sales in violation of the statute were made by a long-time employee of Westside, Claire Feldman. She was familiar with Patterson's (a trade journal) and she made written comparison for the Department investigators, who posed as "special customers" from whom volume purchases might be anticipated, of the published minimum retail prices and the discount prices at which Westside would voluntarily sell the same brand name merchandise. The first Department investigator to visit the Westside store was Daniel H. Latendresse who, on November 14, 1963, represented to Claire that he was employed by a public relations firm, identified as Ben A. Cossart and Associates. She quoted him on his first visit a discount price for Jack Daniels liquor, but he made no purchase. The next day he returned to the store, reminded Claire of their previous conversation, and purchased several bot-

tles of Jack Daniels at a price per bottle below the scheduled minimum retail price for that brand. On November 18, 1963, Department investigator George H. Weiner, representing that he was employed by the same public relations firm, completed a second purchase of brand name liquor from Claire at a price per bottle in each instance lower than the scheduled minimum retail price. Finally, on November 22, 1963, a third Department investigator, Robert LaTouche, visited the Westside store in the company of Latendresse. Claire then offered to place their names on cards in the store's "special customer" file which would reflect the prices she quoted to them, so that in her absence other clerks would acknowledge the deal she had made with these customers. Thereafter, upon request, she went through the whole store with the investigators, quoting various prices for which she would sell them brand name merchandise below minimum retail prices. Finally, she prepared a written list for them which indicated in the left hand column the prices published by Patterson's and in the right hand column the lower prices at which she would sell them the same brands of liquor. On that date LaTouche made the third purchase of brand labelled merchandise below the filed minimum retail price, as alleged in the accusation.

Appellant asserts that the Board exceeded its jurisdiction in deciding the case upon an issue not raised at the hearing before the Department; that Rule 99(k) of the Department is a valid regulation and not in conflict with the controlling statute which it purports to implement; and that substantial evidence supports the Department's decision. These are meritorious contentions.

Neither at the hearing before the Office of Administrative Procedure hearing officer, nor in its appeal to the Board did Westside raise the issue of the validity of Rule 99(k), and at no time did it assert that this regulation exceeded the Department's authority or conflicted with the controlling statute (Bus. & Prof. Code, § 24755(b)). In fact, both the Department and the licensee assumed that the publication requirements of the statute had been complied with to establish effective minimum retail prices for the alcoholic beverage brands in question, and to afford legitimate price protection for the owners of such brand names. Since the issue of whether the publication was proper was not raised at the hearing before the Department, this issue was not properly before the Board. (*Harris v. Alcoholic Bev. Etc. Appeals Bd.*, 197 Cal.App.2d 182; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control,** ..... Cal.2d ....., ...)

The Department, moreover, in passing Rule 99(k) was well within its jurisdiction and was, in fact, fulfilling its constitutional obligation. "'. . . "It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages (citations) . . . The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the privilege of selling alcoholic beverages upon such terms and conditions as it may determine. (Citations.)"'" (*Schuab's Inc. v. Dept. Alc. Bev. Control,* 153 Cal.App.2d 858, 869-870.) Under these circumstances, it is clearly established that the ". . . administrative interpretation of a statute made by an admin-

*Advance Report Citation: 65 A.C. 385, 413.

istrative agency charged with carrying out a particular statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Cohon v. Dept. Alcoholic Bev. Control,* 218 Cal.App.2d 332, 339; see also *Rich v. State Board of Optometry,* 235 Cal.App.2d 591, 604.) The statute in the instant case provides, in part, that any person filing a minimum retail price schedule shall ". . . cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." (Bus. & Prof. Code, § 24755(b).) Rule 99(k) as promulgated by the Department provides that "The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof." (Title IV, Cal. Adm. Code, § 99(k).) It is difficult to see what manner of publication, short of personal service upon or mail directed to each licensee, would be more effective to advise each retailer of the contents of minimum price schedules than the publishing of such schedules in a journal circulated among those persons holding off-sale liquor licenses in the affected trading area.

Subsequent to the date upon which the briefs pertaining to this appeal were filed, it has been held that Rule 99(k) is a valid regulation. (*Reimel v. Alcoholic Bev. Etc. Appeals Bd.,*[b] ..... Cal.App.2d .....; pet. for hearing denied 1/17/68.) Based upon the reasons set forth in that opinion "We conclude that the Department's in-

[b]Advance Report Citations: 256 A.C.A. 188.

terpretation of the publication provisions of section 24755 is reasonable and certainly not 'clearly erroneous.' It should be followed by us. [Citation.]" (*Reimel v. Alcoholic Bev. Etc. Appeals Bd., supra,* p. 201.)

The question presented for review thus ultimately resolves itself into whether the Department's findings were supported by substantial evidence in the whole record. (*Harris v. Alcoholic Bev. Con. Appeals Bd.,* 212 Cal.App.2d 106, 112-113; *Cohon v. Dept. Alcoholic Bev. Control,* 218 Cal.App.2d 332, 337.) Our review of the record discloses ample evidence to prove that the alleged sales of liquor were made at the Westisde store at the prices specified and upon the dates mentioned in the accusation. In each instance, the owner of the brand name of the beverage sold by Claire Feldman had caused a "distilled spirits minimum retail price schedule" to be filed with the Department. Moreover, the parties stipulated at the original hearing that these prices were published in the November 1963 issue of the Patterson California Beverage Gazetteer, a monthly trade journal of general circulation among licensees in the trading area affected (Southern California); they further stipulated that Westside was a subscriber to that trade journal at the time of the charged violations.[1] In this manner the requirements of Rule 99(k)

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[1]"MR. STEVENSON: Second, Your Honor, the Department will offer a stipulation; that the Patterson California Beverage Gazetteer is a trade publication within the southern trading area in the State of California, within the liquor industry; that it was published in the month of November, 1963, and that all alcoholic beverages alleged in the Accusation and the minimum retail prices of each, were published in the November, 1963 issue; and further, that the respondent corporation was a subscriber to the Patterson Gazetteer.

"HEARING OFFICER: Pursuant to stipulation —

"MR. SNYDER: So stipulated. No objection."

were fulfilled, and it is clear that the licensee committed the violation charged of selling alcoholic beverages at prices below the effective *filed minimum* prices pertaining to the specific brand names. Therefore, substantial evidence supports the Department's findings that the violations occurred as charged in its accusation.

The judgment of the trial court is reversed with directions to the superior court to grant a writ of mandate commanding the Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Fourt, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

APPENDIX B.

Opinion of the Alcoholic Beverage Control Appeals Board of the State of California.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA.

In the Matter of the Accusation, against Westside Liquor Company, Inc. dba: Hazan's Wine and Spirits 8209 Santa Monica Boulevard, Los Angeles 45, California a Off-sale general license, Respondent, under the Alcoholic Beverage Control Act.

AB-2397 File No. 58273; Reg. No. 2859.

Time & Place of Hearing: July 21, 1965, at 10 a.m. 1525 South Broadway, Los Angeles, California.

For Department: Honorable Thomas Lynch, Attorney General, Lynn Henry Johnson, Deputy Attorney General.

For Appellant: Abraham Gorenfeld, Esq.

This appellant, Westside Liquor Company, Inc., doing business as Hazan's Wine and Sprits, was determined by the department have violated the fair trade provisions of the Alcoholic Control Act in that he sold certain alcoholic beverages at prices below the effective minimum retail prices for said beverages. The transactions involved cover the dates of November 15. 1963 (count I), November 18, 1963 (count II), and November 22, 1963 (count III). A penalty of revocation of the license on each of the three counts was imposed, separately and severally.

This board has held in several recent decisions (Appeal of Cohon and Sirbu, AB-2089; Appeal of Carella, AB-2181; Appeal of Carella and Maniscalco, AB-2185; and Appeal of Dorian and Matoff, AB-2258) that in order to establish a violation of the minimum price provisons of the Alcoholic Beverage Control Act it is necessary for the record to contain evidence of publication of the price schedules in compliance with the requirements of section 24755 of the Alcoholic Beverage Control Act. This section requires that the price schedules be published "in a manner which will result in each retailer affected by said schedule being advised of the contents of such schedule prior to the effective date thereof." As stated in our earlier decisions, proof of such fact is an essential part of the department's case because the offense here involved is not that of selling below the minimum retail prices filed with the department, but, rather, of selling "at any price less than the effective filed price." To establish the effective filed price of the beverage, it is necessary to prove publication of the price schedule in compliance with requirements of the statute.

The evidence of publication in this case consists of a stipulation set forth on pages 5 and 6 of the transcript. This stipulation provides as follows:

> "MR. STEVENSON: Second, Your Honor, the Department will offer a stipulation; that the Patterson California Beverage Gazetteer is a trade publication within the southern trading area in the State of California, within the liquor industry; that it was published in the month of November, 1963, and that all alcoholic beverages alleged in the Accusation and the minimum retail prices of

each, were published in the November, 1963 issue; and further, that the respondent corporation was a subscriber to the Patterson Gazetteer.

"HEARING OFFICER: Pursuant to stipulation—

"MR. SNYDER: So stipulated. No objection.

"MR. STEVENSON: I will offer this copy of Patterson's California Beverage Gazetteer as the Department's next in order."

In our opinion the foregoing stipulation does not constitute substantial evidence of publication in compliance with the terms of the statute. To the extent that rule 99(k) of the department is inconsistent with Business and Professions Code section 24755, it is invalid.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

Leverette D. House, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur: Leon M. Cooper, Roger P. Garety, Sacramento, California, August 20, 1965.

APPENDIX C.

California Business and Professions Code.

§ *24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales.* (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minumum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under provisions of

Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be sold and in any advertisement in connection therewith, public notice shall be

given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

APPENDIX D.

California Administrative Code.

99. *Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required.* No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) *Brand Defined.* The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) *Distilled Spirits Item Defined.* "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (do-

mestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) *Distilled Spirits Sold "On-Sale" Only.* If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) *Who Files Minimum Retail Price Schedules.*

Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under

that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) *Price Schedule Sheets to be Filed.* Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information

that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) *Filing Dates; New Item.* A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) *Change of Minimum Retail Price on File.* A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) *Change in Price of an Item to Meet Price of Competitive Brand.* A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition

of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) *Filing Date Exception.* Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) *Publication.* The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) *Deliveries.* No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) *Withdrawal of Item from Price Schedule.* No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) *Transfer of Price Filing Obligation.* When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) *Tax Increase or Government Order.* Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) *Sales as Loss Leaders Prohibited.* All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56; Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

Supreme Court, U.S.
FILED
AUG 22 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 324

WESTSIDE LIQUOR COMPANY, a California Corporation,
Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,
Respondent,

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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Art. XX, Sec. 22 3

United States Constitution:

Art. I, Sec. 8, Cl. 3 5

Art. I, Sec. 10, Cl. 2 5

Fifth Amendment 2, 8

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Rules

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IN THE

Supreme Court of the United States

October Term, 1967
No. .....

WESTSIDE LIQUOR COMPANY, a California Corporation,
Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,
Respondent,

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

Respondent, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

Opinion Below

The opinion of the California Court of Appeal, Second Appellate District, Division One, (hearing by the California Supreme Court denied, April 24, 1968) is reported in 259 Advance California Appellate Reports 532, 66 Cal. Rptr. 434 (1968).

Statutes Involved

The principal statutes concerned herein are sections 24749 through 24757 of the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9) attached hereto as Appendix A, and section 99 of Title 4 of the California Administrative Code attached hereto as Appendix B. These statutes involve California's *mandatory* minimum retail price maintenance system for liquor sold at retail in California.

Questions Presented

Appellant's Jurisdictional Statement alleges that the aforesaid California statutes violate:

(1) the anti-trust laws of the United States in that a 1961 amendment to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor allegedly eliminated any requirement of "fair and open competition" (Appellant's Jurisdictional Statement, p. 4), and

(2) the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment in that the statutes unreasonably discriminate in favor of the liquor industry over other industries for no legitimate purpose and allow for two different trading areas within the State of California (Appellant's Jurisdictional Statement, p. 4.)

Respondent respectfully submits that such contentions are erroneous and that no substantial federal question is presented in this appeal.

Statement of the Case

This state court case involves the State of California's regulation and control laws concerning the retail sale of liquor in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution and under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9 §§ 23000 to 25762).

This case deals specifically with the California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance system for the retail sale of liquor in California. This very same type of alcoholic beverage control system has already been before this Honorable Court in *Schwartz v. Kelly,* 140 Conn. 176, 99 A.2d 89 (1953), and this Court dismissed the appeal therein for want of a substantial federal question, 346 U.S. 891.

The main thrust of this case in the California Court of Appeal involved a *state issue* as to what constituted proper publication of the minimum retail prices under former section 24755(b) of the California Alcoholic Beverage Control Act. In addition, appellant also made an attack on the validity of section 24755 of the California Alcoholic Beverage Control Act, as amended in 1961, on the grounds that it allegedly involved an unlawful delegation of legislative power and that it allegedly eliminated any requirement of fair and open competition.

While the appellant raised various possible federal questions in his proceedings before the California Department of Alcoholic Beverage Control and the California Alcoholic Beverage Control Appeals Board, we

would note that the California Alcoholic Beverage Control Appeals Board's decision rests solely upon the *state issue* regarding what constitutes proper publication of the minimum retail prices under the provisions of former section 24755(b) of the California Alcoholic Beverage Control Act.

As shown by the California superior court clerk's transcript, appellant did not raise, urge or attempt to litigate in the California superior court the validity of the statutes involved herein on either state or federal grounds. The pleadings and judgment of the California superior court clearly demonstrate that this case in the superior court involved only the singular *state issue* regarding publication of the prices.

Only when the case reached the California Court of Appeal, and following the filing of the California Department of Alcoholic Beverage Control's opening brief dealing with the singular *state issue* concerning the publication of the prices, did the appellant raise for the first time in the California courts the validity of the statutes involved herein.

In the California Court of Appeal appellant challenged the validity of the statutes on the ground that the statutes allegedly violated due process under the California Constitution in that the statutes allegedly provided for an unlawful delegation of legislative power, and on the ground that the statutes allegedly violated the California Cartwright Act (Calif. Anti-Trust Act) because of an alleged elimination of fair and open competition. This appellant did not raise any issue with respect to the statutes establishing two trading areas in California.

ARGUMENT

I

Both Traditionally and Under the Twenty-First Amendment, a State Has Broad Regulatory Powers Over Alcoholic Beverages Destined for Use, Distribution or Consumption Within Its Borders

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce,[3] (b) import-export,[4] (c) interstate commerce in transit

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[1]*Mugler v. Kansas*, 123 U.S. 623, 657-671 (1887); *Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Giozza v. Tiernan*, 148 U.S. 657, 661-662 (1893); *Cronin v. Adams*, 192 U.S. 108, 114-115 (1904); *Cox v. Texas*, 202 U.S. 446, 451 (1906); *Purity Extract Co. v. Lynch*, 226 U.S. 192, 201 (1912); *Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298 (1917); *Crane v. Campbell*, 245 U.S. 304, 307 (1917); *McCormick & Co. v. Brown*, 286 U.S. 131, 140-141 (1932).

[2]*State Board of Equalization v. Young's Market*, 299 U.S. 59, 63-64 (1936); *Mahone v. Triner Corp.*, 304 U.S. 401 (1938); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Commission*, 305 U.S. 391, 394 (1939); *Ziffrin v. Reeves*, 308 U.S. 132, 138 (1939); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945).

[3]U.S. Const. Art. I, § 8, cl. 3; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U.S. 124 (1964).

[4]U.S. Const. Art. I, § 10, cl. 2; *Department of Revnue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Low v. Austin*, 13 Wall. 29 (1871); and see *Parrott & Co. v. San Francisco*, 131 Cal.App. 2d 332, 280 P. 2d 881 (1955).

through the regulating state,[5] (d) federal enclaves,[6] and (e) possible intolerable burdens on interstate commerce *outside* of the regulating state,[7] this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

As but recently set forth by this Honorable Court in *Seagram & Sons v. Hostetter,* 384 U.S. 35 at 41-43 (1966):

> ". . . The appellants attack § 9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.
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> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second secion of which pro-

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[5] *Duckworth v. Arkansas,* 314 U.S. 390 (1941); *Carter v. Virginia,* 321 U.S. 131 (1944); *Gordon v. Texas,* 355 U.S. 369 (1958).

[6] *Collins v. Yosemite Park Co.,* 304 U.S. 518 (1938).

[7] *Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966). Cf. *United States v. Frankfort Distilleries,* 324 U.S. 293, 299 (1945).

[8] *Schwartz v. Kelly,* 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; *California v. Washington,* 358 U.S. 64 (1958), motion to file complaint denied; *Hooper v. Duncan,* 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; *Plaza Liquor Stores, Inc. v. City of Atlanta,* 381 U.S. 914 (1965), cert. denied; *Laird & Co. v. Cheney,* 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; *Inman v. City of Miami,* 389 U.S. 1048 (1968), cert. denied.

vides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two Terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations). . . .

". . . the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude, for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.[13] (Citation) No such situation is presented in this case. The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." . . . (Footnote omitted.)

In *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner*

Corp., 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington*, 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, §2; *Indianapolis Brewing Co. v. Liquor Commission, supra; Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395; *Mahoney v. Joseph Triner Corp., supra;* and *State Board of Equalization v. Young's Market*, 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights,[9] and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders.[10]

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[9]*Crowley v. Christensen*, 137 U.S. 86, 91 (1890); *Crane v. Campbell*, 245 U.S. 304, 308 (1917).

[10]U.S. Const., 21st Amendment; *California v. Washington*, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 and 2, *supra.*

And with respect to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance requirements for liquor to be sold at retail in California, this Honorable Court has clearly set forth that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders".[11]

II

The California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System Regulates the Retail Sale of Liquor Within the Borders of California and Provides for Orderly Marketing Conditions and the Promotion of Temperance in Connection Therewith

As part of its overall statutory scheme for the regulation and control of alcoholic beverages destined for use, distribution or consumption within its borders, California has for nearly thirty (30) years (1939-1968) prescribed a *mandatory* minimum retail price maintenance system for the retail sale of liquor in California.[12]

The purpose and function of the California Alcoholic Beverage Control Act's mandatory minimum retail price

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[11] *Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341, 344 (1964); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 301 (1945); and see *Washington Brewers Institute v. United States*, 137 F.2d 964 (1943), cert. denied 320 U.S. 776; *Schwartz v. Kelly*, 99 A.2d 89 (1953), cert. denied 346 U.S. 891.

[12] § 99, Title IV, Calif. Admin. Code and Rule 42, Calif. State Board of Equalization (1939-1947); §§ 55.6 and 24749 through 24881, California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) (1947-1968).

maintenance system for liquor[13]—the promotion of both orderly marketing conditions and temperance in the retail sale of liquor in California by the elimination of price wars and cut-rate sales—is set forth at length in the California Supreme Court's recent reaffirmation[14] of the validity of said laws in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349 (Dec. 1966), 420 P.2d 735, wherein the California Supreme Court comprehensively dealt with and rejected the very same arguments which this appellant is now attempting to advance in his jurisdictional statement herein.

As set forth by the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra,* 420 P.2d 735 at 742-748, (most footnotes omitted):

> "Plaintiff first contends that these provisions are unconstitutional because they exceed the police power of the state. In passing upon the validity of that contention, we exercise an extraordinary power over a coordinate branch of government and perform a correspondingly narrow function: we simply determine whether the statute reasonably relates to a legitimate governmental purpose. In so doing, we find the requisite relationship in the absence of an unquestionable contrary

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[13]The California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance law for liquor (§§ 24749 to 24757, Calif. Bus. & Prof. Code) is to be distinguished from California's *permissive* general fair trade law for ordinary commodities (§§ 16900 to 16905, Calif. Bus. & Prof. Code).

[14]See the California Supreme Court's earlier decision upholding the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor: *Allied Properties v. Department of Alcoholic Beverage Control,* 53 Cal. 2d 141 (1959), 346 P.2d 737.

showing. (Los Angeles Met. Transit Authority Public Util. Com. (1963) 59 Cal.2d 863, 867; Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 646.) We must not confuse reasonableness in this context with wisdom. ' "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded . . . ." Ferguson v. Skrupa, 372 U.S. 726, 728-730' (Joseph E. Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 47.)

"To incant these precepts in form and ignore them in substance is to disregard the most basic postulates of representative government; yet, as one court has observed, 'the courts of last resort that have rejected fair trade acts on constitutional grounds seem to have . . . done so because of an unwillingness to accept the legislative judgment as to the economic facts.' (Home Utilities Co. v. Revere Copper & Brass, Inc., supra, 209 Md. 610, 617). On such debatable matters the Legislature properly serves as the court of last resort. When, as in this case, 'appeal is made to liberties which derive merely from shifting economic arrangements' (Kovacs v. Cooper (1949) 336 U.S. 77, 95 (Frankfurter, J., concurring)), the judgment of the Legislature reaches this tribunal with a momentum for respect lacking when the Legislature tampers with 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.' (Ibid.) With these admonitions in mind, we turn to plaintiff's contention that the retail price main-

tenance provisions of the Alcoholic Beverage Control Act bear no reasonable relation to any legitimate governmental purpose.

"The Legislature adopted the Alcoholic Beverage Control Act 'for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.' (Bus. & Prof. Code, § 23001.) With regard to the retail price maintenance provisions specifically, the Legislature made its purpose plain: 'It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages . . . for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.' (Bus. & Prof. Code, §24749.)

"The promotion of temperance in the consumption of alcoholic beverages and of orderly conditions in their marketing clearly constitute proper legislative objectives. The declared purposes of the Alcoholic Beverage Control Act in general and

of its retail price maintenance provisions in particular are therefore entirely legitimate, and we must sustain the price maintenance provisions if they bear a reasonable relationship to any of those purposes.

"We turn first to the purpose of promoting temperance. The retail price maintenance provisions proceeded on the assumption that 'the elimination at the retail level of price cutting, bargain sales, and advertising of low prices tends to reduce excessive purchases of alcoholic beverages.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148.) We cannot call such an assumption irrational. In upholding the validity of a state statute limiting retail liquor licenses to two per person, the New Jersey Supreme Court held that in formulating its policy the Legislature could properly accept 'widely held views as to sound liquor control,' including the 'beliefs that the consumption of liquor is elastic rather than inelastic, [and] that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption. . . .' (Grand Union Co. v. Sills (N.J. 1964) 204 A.2d 853, 859)

"Our Legislature may have sought to prevent the special inducement to purchase liquor which results from loss leaders, price-cutting, and bargain sales at the retail level (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148-149.) That the Legislature did not also seek to prevent intemperance by limiting the volume of liquor sales, by regulating competition

among producers and wholesalers, or by establishing high liquor prices generally, creates no constitutional infirmity. As we said in Board of Education of City of Los Angeles v. Watson (1966) 63 Cal.2d 829, 833, 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident.'

"The selectivity of our Legislature's approach to the problem of intemperance might reflect a variety of entirely legitimate considerations. Thus the Legislature could have reasoned that some people might respond more impulsively to bargain sales of their preferred brand than to bargains offered by competing brands. Or the Legislature might have concluded that unregulated competition among the relatively few liquor producers and wholesalers would not unduly stimulate liquor consumption but that similar competition among the large number of retailers, who come into direct contact with consumers and who are more vulnerable to economic pressure, would stimulate selling practices calculated to induce intemperance. We cannot say that all of these suppositions would have been 'palpably arbitrary and beyond rational doubt erroneous.' (In re De La O (1963) 59 Cal. 2d 128, 153; State of California etc., v. Ind. Acc. Com. (1957) 48 Cal.2d 365, 371.)

"Plaintiff calls our attention to the fact that the New York Moreland Commission (see New York

State Legislative Annual (1964) 401-408, 484-489, 498-500) found that mandatory retail price maintenance did not significantly reduce the consumption of alcoholic beverages. We note, however, that the response to the Moreland Commission Report in New York came from the Legislature (Session Laws of New York, 1964, ch. 531, § 11), not the courts. Legislative revision of a statute cannot be equated to its death knell by judicial decree.

"We turn to the second legislative purpose: the promotion of the orderly sale and distribution of alcoholic beverages. Retail price wars among liquor distributors may encourage retailers, struggling to withstand the pressure of ruinous competition, to sell liquor below cost in violation of Business and Professions Code section 17043 or to transgress the regulatory laws governing retail liquor (Bus. & Prof. Code, §§ 25600-25666).[9] To the extent that the retail price maintenance provisions eliminate retail price wars in the liquor industry, they undeniably discourage such disruptive practices.

"The Legislature may likewise have concluded that giant retailers and chain markets should be

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"[9]As one court put it, 'The liquor industry is *sui generis*. If conditions of competition come about that threaten the economic existence of a vast number of small retailers, there exists a real threat that they may take illegal shortcuts to maintain their solvency, to the detriment of the industry and the harm of the public.' (Grand Union Co. v. Sills (N.J. 1963) 194 A.2d 591, 595, affd. Grand Union Co. v. Sills, supra, 204 A.2d 853. See also Schwartz v. Kelly, supra, 140 Conn. 176, 180; Supreme Malt Products Co., Inc. v. Alcoholic Beverage Control Commission, supra, 334 Mass. 59, 62.)

afforded no opportunity to use loss leaders in branded liquor to attract customers in disregard of Business and Professions Code section 17044 and thus ultimately to force smaller retailers out of business. Such tactics, the Legislature may have thought, would disrupt orderly distribution by endangering the continued vitality of one method of marketing: the corner grocery store. The Legislature may have decided not to expose these channels of distribution to possible economic destruction through manipulation, by powerful competitors, of so highly volatile and attractive a product as branded liquor.

"Plaintiff answers that the instant legislation reaches unnecessarily far in this respect because the kinds of marketing disruptions that we have described may be curtailed by present statutes. But, in the first place, even assuming that the Legislature did no more than fashion further means of prescribing previously prohibited practices (Bus. & Prof. Code, §§ 25600-25666; Id., §§ 17000-17101), we see no ground for unconstitutionality in such duplication. The possibility that 'other less stringent . . . regulations might have sufficed is not our concern; that is a matter lying within the discretion of the legislative body.' (Nat. Milk etc. Assn. v. City etc. of S.F. (1942) 20 Cal.2d 101, 115)[10].

"[10]The principle that even a legitimate governmental purpose 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' (Shelton v. Tucker (1960) 364 U.S. 479, 488) has no application to a purely economic regulation, impinging in no significant way upon the dignity or freedom of the individual.

"In the second place, the Legislature may have intended more than the fortification of existing statutory regulations. It may have sought to fill the gap between price-cutting procedures pursued in practice and those proscribed by law. The Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101) does not offer a facile means for the prevention of all below cost and loss leader selling; the requirements of proof of such selling under the act are stringent and for this reason the act is rarely invoked. The Legislature could certainly have concluded that such legislation would be of small comfort and little aid to independent retailers in their struggle against large-scale price-cutting competitors.

"Whatever dangers the Legislature thought implicit in disorderly marketing, we cannot question the wisdom of its concern. As we said in another context, 'Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant.' (City of Bakersfield v. Miller (1966) 64 A.C. 95, 102.)

"Finally, plaintiff contends that the retail price maintenance provisions, even if reasonably related to either or both of their declared objectives, cannot be justified as an exercise of the police power because their 'real' purpose and effect is not to regulate the sale of alcoholic beverages in the public interest but to swell the profits of the liquor industry.

"Insofar as plaintiff's contention focuses on the legislative *purpose,* it amounts to a suggestion that we should not take the Legislature at its word but should instead decide for ourselves, by a process which remains unexplained, what the Legislature 'really' intended to achieve by enacting the provisions in question. Although several courts have acceded to that suggestion, we do not believe that we are either authorized or equipped to undertake so ill-defined and hazardous an inquiry. '[T]his court may not presume that in reaching its decision [the Legislature] acted upon improper motives. ". . . a judiciary must judge by results, not by the varied factors which may have determined legislators' votes . . ." [citations].' (Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal.2d 121, 129.) 'Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it [footnote omitted].' (Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541, 551.)

"Insofar as plaintiff's contention focuses on the legislative *effect,* we cannot fail to recognize it as an invitation to hold the law invalid because we disagree with its desirability. As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficient impact upon a particular segment of society.

"At its base, the argument that the statute is unconstitutional because of its supposed bias in favor of the liquor industry rests upon a wholly unrealistic view of the legislative process. As our social and economic life grows in complexity, leg-

islation necessarily increases in the differentiation of its techniques and in the specialization of its objectives. Thus the endeavor to achieve the general welfare of the whole through the special welfare of each part becomes ever more necessary. By protecting the interests of complaining constituents through legislation tailored to meet their particular needs, the Legislature can seek to maximize the satisfaction of society as a whole. Surely courts should not inject themselves into this inherently pluralistic process of compromise by attempting to reserve to themselves a power to veto the balance struck because of a bare belief in its undesirability.

"Plaintiff's second basic challenge to the constitutionality of the retail price maintenance provisions is that they unlawfully delegate legislative power by enabling each producer and wholesaler to set the price below which retailers may not sell his product. We rejected precisely that contention in Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 149-152, just as we rejected a similar contention in sustaining the general Fair Trade Act (Bus. & Prof. Code, §§ 16900-16905) against a challenge of unlawful delegation in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 888. We see no reason to depart from those holdings.

"To contend that the Alcoholic Beverage Control Act unlawfully delegates legislative power is to misconceive the nature of the power which is purportedly delegated. The power we analyze here finds expression in the private act of the producer

in entering into a contract setting a price for the resale of his own brand. *Scovill* tells us that this act is not the performance of a legislative function and not the exercise of an unlawfully delegated power. Nor does plaintiff directly question *Scovill.* Yet, if the producer's contractual designation of a resale price binding on all retailers is not the exercise of an unlawfully delegated legislative power, the statutory *requirement* that he designate that price cannot transform his act into the exercise of such a power. The statutory requirement clearly confers no *power* on the producer that he would not have possessed without it.

"*Allied Properties* makes this point abundantly clear. In describing the alleged delegation, the opinion in *Allied Properties* states that 'the function performed by the persons who assertedly exercise delegated legislative powers is the same under the general Fair Trade Act and the Alcoholic Beverage Control Act.' (P. 149.) The opinion points out that the act of designating a resale price binding on all retailers is '"no more legislative in character than are other acts . . . of private parties undertaken as a prerequisite to the application of a statute."' (P. 149.)

"To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the crucial distinction between the fixing of a price for *all*

products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold.[13] As *Allied Properties* explains (pp. 151-152), this distinction finds dramatic illustration in the difference between the instant legislation and the statute involved in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436.

"The court in *Thrift-D-Lux* declared unconstitutional a statute which delegated to the State Board of Dry Cleaners the power to fix minimum prices. (Bus. & Prof. Code, §§ 9560-9567, repealed by Stats. 1957, ch. 1961, § 11.) The statute entrusted the board with the power to decide, in terms of the public health and safety, which cities should have minimum price schedules, which services should be included in those schedules, and what prices should be charged for the services. As *Allied Properties* points out, the court in *Thrift-D-Lux,* in holding the statute unconstitutional, 'relied on the ground that there was a delegation of legislative power without ascertainable standards

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"[13]The Alcoholic Beverage Control Act delegates to the producer no power which he could not in theory achieve unilaterally. The producer could, subject of course to the antitrust laws (see, e.g., Simpson v. Union Oil Co. (1964) 377 U S 13), maintain his own retail outlets or place his goods on consignment and thereby reserve full control over their retail price without the aid of price maintenance legislation of any kind. The infeasibility of such vertical integration in the liquor industry should not be permitted to obscure the fact that the Legislature has simply attempted to simulate some of the marketing conditions which would prevail if vertical integration were to take place.

to an administrative board composed mainly of members of the industry who would participate in fixing prices to be charged by their competitors. . . . On the other hand it was held in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 887-888, that there was no delegation of legislative power where manufacturers, acting in their private capacity under the general Fair Trade Act, fixed the prices for which their own products were to be sold at retail by persons who were not their competitors. The distinguishing factor is that the dry cleaners' board was directed to fix uniform minimum prices for the services of all dry cleaners in limited areas on the basis of what is believed was required by public health and safety, whereas under the general Fair Trade Act each manufacturer is to fix retail prices for his own products in accord with his personal interest.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 151-152.)

"When the power which the Legislature purports to confer is the power to regulate the business of one's competitors, as in *Thrift-D-Lux,* or the power to exclude potential competitors from an entire industry or occupation, as in Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 235-236, a real danger of abuse arises, and the courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power.

"A similar insistence upon stringent standards would serve little if any purpose in the case of the

Alcoholic Beverage Control Act. As we noted in *Allied Properties* (53 Cal.2d pp. 151-152), that act authorizes no individual or group to exercise either regulatory or exclusionary power over any competitor, actual or potential. The Legislature has not authorized anything resembling 'price-fixing' in the traditional, horizontal sense: it has authorized no one to fix the price charged by a competitor. Thus the Alcoholic Beverage Control Act does not create the special danger threatened by a statute which delegates *industry-wide* regulatory power to interested members of the regulated industry.

"To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers,[15] coupled with the bargaining power of those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit stand-

"[15]At the time of the transactions in question, section 24755 of the Business and Professions Code required, and section 24750 permitted, retail price maintenance only as to brands which were 'in fair and open competition with alcoholic beverages of the same general class.' Although some commentators took the view that this limitation had little practical effect (see, e.g., Herman, Free and Open Competition (1957) 9 Stan.L.Rev. 323, 327), the Legislature could reasonably have reached a different conclusion. Moreover, apart from the 'fair and open competition' clause, the Legislature, as we said in Allied Properties (53 Cal.2d p. 148), 'could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers.'

ards for the setting of retail prices, enforcible by an administrative or judicial agency.[16] To impose a requirement of expressed legislative standards would here reflect 'little more than a judicial fetish for legislative language, the recitation of which [would provide] no additional safeguards to persons affected by the exercise of the delegated authority.' (Warren v. Marion County (1960) 222 Ore. 307, 314; see also 1 Davis, Administrative Law Treatise, § 2.15, pp. 148-151 and 1965 Supp., pp. 52-55; Jaffe, Law Making by Private Groups (1937) 51 Harv.L.Rev. 201, 248-251.)

"In light of these observations, we find transparently erroneous the arguments that the statute unlawfully delegates 'price-fixing' power because (1) the producer *must* set the price which will be observed in resale; (2) the law imposes an obligation upon all people in this state to observe that price; and (3) the violation of the act is a 'public offense.'

"All three arguments ignore the basic difference between a statute requiring the unilateral designation by each producer of the resale price of his own product and a statute requiring the multilateral observance by all competitors of a fixed minimum price of a commodity. That the private act of specifying a resale price is lifted by the statute beyond the contracting producer and retailer to a publicly enforced observance by all retailers within

"[16]The extraordinary difficulty of formulating meaningful price guidelines suggests that any legislative effort to do so here might well have proven utterly futile. (See, e.g., Fulda, Resale Price Maintenance (1954) 21 U.Chi. L.Rev. 175, 182 fn. 33.)

the state does not convert the legislation into a 'price-fixing' statute, since the law still empowers no one to regulate the retail price of any commodity.

"Although the Alcoholic Beverage Control Act *requires* (Bus. & Prof. Code, § 24755), whereas the Fair Trade Act merely *permits* (Bus. & Prof. Code, § 16902), producers and wholesalers to set retail prices, this mandatory aspect of the Alcoholic Beverage Control Act 'does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action of the producers and wholesalers.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 150.) The mandatory feature of the act endangers none of the interests which the anti-delegation doctrine seeks to protect, since it threatens neither the principle that truly fundamental issues should be resolved by the Legislature nor the precept that a grant of authority should be accompanied by safeguards adequate to prevent its abuse. Thus it provides no reason to hold that the act unconstitutionally delegates legislative power."

III

The 1961 Amendments to the California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System for Liquor Do Not Eliminate the Requirements of Fair and Open Competition and Do Not Conflict With the Federal Anti-Trust Laws

Appellant erroneously contends in his jurisdictional statement that "When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement." (Appellant's Jurisdictional Statement, p. 14.) Hence, argues the appellant, California's mandatory minimum retail price maintenance system for liquor is now in violation of the federal anti-trust laws because the requirement of free and open competition has been eliminated by the 1961 amendment to the California law.

Such a contention rests upon erroneous premises, completely ignores the specific holding of the California Court of Appeal herein with respect to same, and is totally without merit.

Prior to 1961, the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor involved the use of the so-called "fair trade contract" as the vehicle for filing the minimum resale price with the California Department of Alcoholic Beverage Control. Following attacks by violating licensees on the validity of the "fair trade contracts" on various quasi-contract grounds (i.e. no mutuality of obligation, failure of consideration, non-signer, etc., see

De Martini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787 (1963), 30 Cal. Rptr. 668) the California Legislature in 1961, while retaining and authorizing "fair trade contracts" under the California Alcoholic Beverage Control Act (§§ 24750-24753, Calif. Bus. & Prof. Code), amended section 24755 of the Alcoholic Beverage Control Act so as to substitute a "minimum retail price schedule" in place of the "fair trade contract" itself as the vehicle to be used in filing the minimum retail prices with the Department of Alcoholic Beverage Control

The use of the "minimum retail price schedule" as the filing vehicle in California's mandatory minimum retail price maintenance system is adopted from Connecticut's mandatory minimum retail price maintenance system for alcoholic beverages, which, as heretofore noted, has already been the subject of an appeal to this Honorable Court and this Court dismissed the appeal for want of a substantial federal question. (*Schwartz v. Kelly,* 140 Conn. 176, 99 A.2d 89, 346 U.S. 891.)

It may be noted that besides *California* and *Connecticut,* the unilateral filing of a minimum retail price schedule is the vehicle used to establish minimum retail prices in *Hawaii* (Rev. Laws of Hawaii 1955, Title 21, Ch. 159) *Massachusetts* (Mass. Gen.Laws, Ch. 138, § 25C), *Minnesota* (Laws of 1951, M.S.A. 340.97-340.978), *New Jersey* (Dept. of Law and Public Safety Div. of A.B.C., State Reg. #30), and *New York* (wine) (N.Y. Consol. Laws, Ch. 3-B, § 101-bbb).

As set forth in the decision of the California Court of Appeal in *Reimel v. Alcoholic Beverage Control Appeals Board,* 256 A.C.A. 188, 64 Cal. Rptr. 26, at 34-

35 (1968) where the court was considering the same argument which the appellant makes here:

> "Nor do we deem the absence from section 24755 of specific requisite that the brands be in 'fair and open competition with alcoholic beverages of the same general class produced by others' to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758.) Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law. (Citation.)
>
> "Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions[8] constituted evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (Citations.) DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App. 2d, supra, pp. 813-814, also held that express findings that the products were in fair and open competition were not required." (Footnote omitted.)

Notwithstanding the power given to the states under the Twenty-first Amendment with respect to alcoholic beverages destined for use, distribution or consumption

within the states' borders (See Argument I, *supra*), the instant case does *not* present a conflict between state power under the Twenty-first Amendment and federal power under the Commerce Clause. The California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor sold at retail in California does *not* sanction horizontal price-fixing comspiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

As cogently noted by this Honorable Court[15] in *Seagram & Sons v. Hostetter*, 384 U.S. 35 at 45 (1966):

> "The appellants' contention that § 9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between § 9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-7 (1964 ed.), and § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
>
> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" . . . (Emphasis added.)

[15]Nor should it be overlooked that this Honorable Court has consistently upheld state sanctioned minimum resale price maintenance programs even as to ordinary commodities. (*Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U.S. 306 (1964); *Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936); *Schwegmann Bros. Giant Super Markets v. Hoffman-LaRoche, Inc.*, 221 F.2d 326 (1955), cert. denied 350 U.S. 839; *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F.2d 788 (1953), cert. denied 346 U.S. 856.)

In making his factual assertions and legal contentions concerning an alleged lack of, or non-requirement of, fair and open competition in the sale of liquor in California under California's mandatory minimum retail price control provisions, appellant simply fails to perceive and recognize that under California's past and present minimum resale price control provisions for liquor there is no conflict with the federal anti-trust and unfair practice laws presented.

The past and present policy of California with respect to the retail sale of liquor under the mandatory minimum retail price control provisions—as said policy is expressed in sections 23001 and 24749 of the California Alcoholic Beverage Control Act—does not sanction or permit, nor do the provisions themselves sanction or permit, in any way, horizontal price-fixing conspiracies or restraints of trade, anti-trust violations, or vertical unfair trade practices. Hence, the federal government, as well as the State, may take action against any such violations, and correct any such abuses.[16]

In actual practice, the federal anti-trust and restraint of trade laws together with California's corresponding companion laws foster and support the orderly functioning of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor.[17]

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[16]*Burke v. Ford*, 389 U.S. 320 (1967); *Melrose Distillers, Inc. v. United States*, 258 F.2d 726 (4th Cir. 1958), affirmed 358 U.S. 878; *United States v. Maryland State Licensed Bev. Association*, 169 F. Supp. 431 (1959); *United States v. Maryland State Licensed Beverage Association*, 138 F.Supp. 685 (1956); *United States v. McKesson & Robbins*, 351 U.S. 305 (1955); California Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq., 25503 & 25505; 15 U.S.C.A. § 1 et seq.

[17]The California Court of Appeal in *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal.App.2d 787, 809-

It is only against uncontrolled price wars, cut-rate sales and ruinous competition in the retail sale of liquor within its borders that California has resolutely set its statutory face.

Conclusion.

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

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(APPENDICES FOLLOW)

811[8] (1963) 30 Cal.Rptr. 668, 680-681, hearing by California Supreme Court denied, held that it was a matter of common knowledge in California (to the extent that California courts could take judicial notice thereof) that there are countless retail outlets in California merchandising countless brands of distilled spirits, which countless brands vie with each other for public favor.

APPENDIX A.

CHAPTER 10. ALCOHOLIC BEVERAGES FAIR TRADE CONTRACTS AND PRICE POSTING

§ 24749. Policy.
§ 24750. Contracts lawful.
§ 24750.5 Wine fair trade contracts.
§ 24751. Closeouts.
§ 24752. Selling below fair trade price.
§ 24753. Contrasts between producers.
§ 24754. Containers.
§ 24755. Price schedule; "Loss leader."
§ 24755.1. Penalties.
§ 24756. Distilled spirits price posting.
§ 24757. Rules.

24759. Policy. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.

24750. Contracts lawful. No contract relating to the sale or resale of any alcoholic beverage which bears,

or the label or container of which bears, the trademark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

(b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

24750.5. Wine fair trade contracts. Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11 (commencing with Section 24850).

24751. Closeouts. The provisions authorized by Section 24750 in any contract imply conditions that the alcoholic beverage may be resold without reference to the agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage. At the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice shall be given of the character of the sale as a closeout sale. The alcoholic beverage shall first be offered to the manufacturer or vendor thereof at the original invoice price at least 10 days before it is offered for sale to the public.

(b) When the alcoholic beverage or container is damaged or deteriorated in quality, and notice of this fact is given to the public at the place of any such sale and upon the goods sold and in any advertisement in connection therewith.

(c) By any officer acting under the orders of any court.

24752. Selling below fair trade price. Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter or in any effective minimum retail price scheduled filed with the department pursuant to Section 24755, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

24753. Contracts between producers. This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

24754. Containers. The provisions of this chapter apply to the containers, cartons, cases, or bottles for alcoholic beverages.

24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amend-

ments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss Leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in

the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirts or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so

filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

24755.1 Penalties. No criminal penalties shall be imposed on any licensee for a violation of the provisions of Section 24755 nor shall the license of a licensee by suspended or revoked for a violation of such section.

The penalties imposed by the department for violations of such section shall be confined solely to monetary penalties for each violation committed during 36 consecutive months and shall be in the following amounts:

For the first violation, two hundred fifty dollars ($250); for the second and subsequent violations, one thousand dollars ($1,000). The penalties herein provided shall be due and payable by the licensee to the General Fund not later than 30 days from the date the department rendered its decision imposing the penalty. Should the licensee appeal the decision of the department, he shall either pay the amount of the penalty under protest or execute a surety bond in the amount of the penalty. The surety bond shall be executed by the licensee as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this state as surety, payable to the General Fund at such time as the final decision is rendered affirming the department's decision. If the final decision should reverse the decision of the department, the penalty paid by the licensee under protest shall be returned to him with interest at the rate of 6 per cent per annum or the surety bond executed by the licensee terminated.

The license of a licensee against whom the departent has imposed the monetary penalty and who has refused to pay the penalty for each violation under protest or execute a surety bond as herein provided shall be automatically suspended and shall remain suspended until such time as the licensee either pays the penalty under protest or executes the surety bond as herein provided.

Each sale in violation of section 24755 shall constitute a separate violation.

24756. *Distilled spirits price posting.* Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

24757. *Rule.* The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive, and shall take such steps as may be necessary to enforce the provisons of such sections and the rules adopted by it for the administration thereof.

APPENDIX B.

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word 'brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesale or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by

a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower lefthand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minumum retail case prices covering all

case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price

change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed

with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation.. When for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of

acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution, Issuing agency; Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752; Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

WESTSIDE LIQUOR CO. *v.* KIRBY.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 324. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.